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No. 09-32

IN THE
Supreme Court of the United States

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF OF THE PETITIONERS

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REPLY BRIEF OF PETITIONERS

In its Opposition Brief, the Government takes an oft-used, but rather worn-out, tactic: "let us rewrite the question and thereby avoid the issue." As rewritten by the Government, this case resolves into a simple, individual tax dispute that is lightly and easily dismissed.

Rewriting allows the Government to ignore the significant issues raised concerning the Distribution Act and Congress' power over tribal judgment funds.

If the Government succeeds, then it gains much:

1. it does not have to it explain why the Tenth Circuit can apply the "tax canon" beyond the clear words of a statute that the Tenth Circuit agrees plainly grants an income tax exemption;

2. it is not bothered to reconcile the Tenth Circuit's conflict with the Ninth Circuit's approach to applying the "tax canon" to tribe specific legislation; *Ramsey v. United States,* 302 F. 3d 1074 (9th Cir. 2002) *cert. denied*, 540 U. S. 812, 124 S. Ct. 54, 157 L.Ed.2d 25 (2003);

3. it does not have to justify the Tenth Circuit's decision to override the statutory construction principles that

this Court established in *Delaware Tribal Business Committee v. Weeks*, 430 U. S. 73, 97 S. Ct. 911, 51 L.Ed.2d 173 (1977);

4. it does not have to mention the Tenth Circuit's conclusion that the "tax canon" is a limit on the Constitution's grant of power to Congress over tribal judgment funds; and

5. it does not have to resolve the messy problem created by the Tenth Circuit's infringement on the act of a tribal government – an act required and authorized by Congress and the Secretary of the Interior.

If the Government's re-write of the question is accepted, then all of these troublesome issues disappear.

A re-write of the question is about all that the Government offers in its brief. The Government depends solely on this age-old strategy to whitewash the problems created when the Tenth Circuit's decision is measured against either the Distribution Act, Congress' power over Indian policy and tribal judgment funds, or long-established principles of this Court.

The extent of the Government's reliance on its re-write is shown by the string-cite of authority at pp. 6 – 7. Without exception, the cases cited did not apply the "tax canon" beyond statutory words that

clearly granted a tax exemption. The cited cases did not involve Congress' unique power over tribal judgment funds. They did not limit a Constitutional grant of power to Congress by means of a canon of statutory construction; they did not disregard prior authority such as *Delaware Tribal Business Committee;* and they did not infringe upon an authorized and required tribal government act which appropriated tribal government funds and assigned tribal government duties. Some of the cases do not even involve a statute or treaty. The Government must re-write the question so that it can ignore these issues and make the simple resolution that this case involves "factbound" conclusions which do not warrant review. (Opp. Br. 7)

PETITIONERS' REPLY TO ARGUMENT
(Opposition Brief at pp. 4 - 7)

This case should be reviewed because the Tenth Circuit applied the "tax canon" beyond the statutory words that clearly grant an income tax exemption, and thus created a conflict with the Ninth Circuit's approach of limiting the "tax canon" to the words of the statute itself. If the statutory words show that Congress intended to grant a tax exemption, then the Ninth Circuit preserves Congress' intent, even if that requires applying less stringent principles of interprettation to non-statutory material. *Ramsey v. US*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003).

The Opposition Brief acknowledges that 25 U.S.C. § 1407 provides an express income tax

exemption for funds used under a plan approved under the Distribution Act. (Opp. Br. p. 5) But, the Opposition Brief, like the Tenth Circuit, has to dig deep into the depths of the plan itself (the 1983 Agreement) and apply the "tax canon" to deny the income tax exemption in this case.

The Opposition Brief correctly points out, in a footnote, that *Ramsey* did not involve the Distribution Act. (Opp. Br. p. 7 at fn. 2.) The Government ignored the fact that both *Ramsey* and this case involve determination of a federally granted tax exemption. In *Ramsey,* the Ninth Circuit limited the "tax canon" requirement of "express exemptive language" to the text of the treaty at issue; it pointed out that if the required exemptive language were present, other ambiguities should be construed favorably to Indian tribes. *Ramsey,* 302 F 3d at 1079. In contrast, the Tenth Circuit applied the "tax canon" clarity standard far beyond the statute's clear grant of a tax exemption. The Tenth Circuit found a lack of express exemptive language in the details of the 1983 Agreement — a document Congress used to provide flexibility for future tribal government action.

A conflict in principle, or a conflict in approach, is a recognized basis for granting review. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,* 473 U. S. 753, 764, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985); *Saxbe v Washington Post Co.,* 417 U. S. 843, 846, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974).

The *Ramsey* opinion noted this Court's inconclusive discussion in applying the "tax canon"

and the "Indian canon" to statutory language in *Chickasaw Nation v U. S.*, 534 U. S. 84, 122 S.Ct. 528, 151 L. Ed. 2d 474 (2001), but determined that the discussion did not persuade it to change the long-standing approach used to decide *Ramsey*. A court of appeals decision on a point reserved or left undecided in one of this Court's earlier opinions is also a recognized basis for granting review. *Brown v. Legal Foundation of Wash.*, 538 U. S. 216, 220, 123 S. Ct. 1406, 155 L.Ed.2d 376 (2003).

In addition, review is warranted because the Tenth Circuit opinion shows that Congress cannot protect the Distribution Act from an overly broad judicial application of the "tax canon." Congress clearly chose to put a tax exemption in the Distribution Act. Congress then specifically said that the Distribution Act was to apply "[n]otwithstanding any other law..." 25 U. S. C. § 1401(a). Thus, application of the "tax canon" beyond the statutory words, or perhaps even at all, is contrary to holdings of this Court. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("notwithstanding" clause clearly signals intent "to supersede all other laws," and a "clearer statement is difficult to imagine"); *Long Island Railroad Co. v. Aberdeen & Rockfish Rail Road Co.*, 439 U.S. 1, 5 99 S.Ct. 46, 58 L.Ed.2d 1 (1978) (per curiam) ("notwithstanding any other provision of law" includes federal law).

Congress can do no more. Its ability to exercise its Constitutional power to determine and implement policy as to Indian affairs should not be

subject to being changed by a court's broad brush application of canons of statutory construction.

The importance of assuring a proper application of the "tax canon" to tribe specific, remedial legislation is shown by the fact that the Tenth Circuit was able to defeat Congress' clear statutory grant of a tax exemption. It is underscored by the Tenth Circuit's stated reasoning that Congress' Constitutional power to set and implement policy as to Indian affairs "...does not trump..." a court's application of a canon of statutory construction.

This is not an individual tax case. Even the Opposition Brief recognizes the applicability of the Distribution Act. But, based on the Opposition Brief, one wonders whether any individual would qualify for the express income tax exemption set forth in 26 U.S.C. § 1407. The exemption can not be directed at the Tribe because the Tribe is not subject to income tax. The only rational basis for the argument of the Opposition Brief is the avoidance of the significant Constitutional, Congressional powers over Indian affairs, and conflicting statutory interpretation issues raised by Petitioners.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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